Supreme Court, U.S.
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No. 99-974

In The

Supreme Court of the United States

JACQUELINE MCKINLEY,

Petitioner,

v.

NORTHERN TELECOM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

ROBERT E. SHEEDER*
R. S. GHIO
JENKENS & GILCHRIST
A PROFESSIONAL CORPORATION
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202
(214) 855-4500
Counsel for Respondent
* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21PP

QUESTION PRESENTED

May a Federal Court of Appeals properly dismiss an appeal where the appellant fails to timely file a brief as a result of the appellant's willful noncompliance with the requirements of the Federal Rules of Appellate Procedure and the Local Rules of the Court of Appeals?

PARTIES TO THE PROCEEDING

Respondent, Nortel Networks Inc. (formerly Northern Telecom, Inc.) is a wholly-owned subsidiary of Nortel Networks Corporation, a publicly traded company, and Petitioner is Jacqueline McKinley.

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STATEMENT OF THE CASE

On or about June 4, 1997, Petitioner filed her Original Petition in the 162nd District Court of the State of Texas, County of Dallas, alleging retaliation for having exercised her rights under the Texas Worker's Compensation Act. On August 19, 1997, Respondent, Nortel Networks Inc. (formerly Northern Telecom, Inc.) ("Nortel") timely removed the case to the United States District Court for the Northern District of Texas, Dallas Division, based upon federal question and diversity jurisdiction.

On December 8, 1998, Nortel moved for summary judgment on all of Petitioner's claims. On January 19, 1999 the District Court granted Nortel's Motion for Summary Judgment in its entirety and dismissed Petitioner's case with prejudice. On February 18, 1999, Petitioner filed a Notice of Appeal with the U.S. District Court.

Petitioner's appeal was dismissed not once, but *twice* by the Fifth Circuit Court of Appeals.[1] The appeal first was dismissed on March 18, 1999 for Petitioner's failure to timely order a transcript from the District Court and make financial arrangements for a transcript within the time fixed by the Fifth Circuit's Local Rules.[2] Although

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[1] Although only the second dismissal is the subject of the Petition, the details of the first dismissal are significant because they demonstrate a pattern of willful neglect and noncompliance with the rules by Petitioner, which culminated in the ultimate dismissal of her appeal.

[2] Petitioner implies that this first dismissal was an error by the Fifth Circuit, because the case had been dismissed on summary judgment, and therefore there was no transcript to order. Petition for Writ of Certiorari ("Petition") at 4. However,

the Clerk of the Fifth Circuit had directed Petitioner by letter of February 25, 1999 to "complete the transcript order form" within fifteen days or the case would be dismissed without further notice, Petitioner did not comply. In her motion to reinstate the appeal, Petitioner explained that her attorneys failed to submit the Transcript Order because they had *twice* attempted to submit the form to the *state* district court; apparently forgetting that the case had been removed. Motion to Reinstate at 2-4. Significantly, Petitioner's counsel admitted that they first attempted to complete the form one day before it was due; that they waited another *six* days before their second attempt to submit it to state court; and that they waited *another five days* to complete the form *after* they realized that the case was removed to the Northern District of Texas. Thus, they simply refused to act expeditiously, even when they knew that the deadline to file the form had passed.

The Fifth Circuit granted Petitioner's Motion to Reinstate on April 27, 1999. On May 10, 1999, the Clerk of the Fifth Circuit sent Petitioner's counsel a letter stating that the appeal had been docketed, and that Petitioner's brief was due within forty (40) days of the date of the letter.

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the Fifth Circuit's only means of knowing that there was no transcript was for *Petitioner* to file the Transcript Order Form, which provides a space on which an appellant can affirm that there were no hearings to be transcribed. Thus, even though the Fifth Circuit reinstated the appeal, there was no "recognition" that the dismissal was in error: clearly it remained Petitioner's duty to notify the Fifth Circuit, via the Transcript Order Form, that there were no hearings.

Among other things, the Clerk instructed Petitioner's counsel:

> If you have not filed an appearance form as required by 5th Cir. R. 46, you must do so within 10 days from this date. . . .
>
> *We will not forward the record until you file an appearance form.*

Letter of May 10, 1999 (attached hereto as Appendix 1) (emphasis added). This letter simply re-stated a similar instruction from the February 25, 1999 letter (an instruction with which Petitioner had not complied):

> All counsel who desire to appear in this case must sign and return the attached appearance form . . . within 15 days from this date, see Fed. R. App. P. 12(b) and 5th Cir. R. 12. If you fail to do so we will remove your name from our docket in this case. We cannot release official records on appeal unless you have entered an appearance.

Letter of February 25, 1999 (attached hereto as Appendix 2).

Despite these admonitions, Petitioner's former counsel did not file a form of appearance until June 26, 1999, some four months after receipt of the first notice, six weeks after the second notice, and approximately one week after the appellant's brief was due. That same day Petitioner sought additional time to file her brief, stating only that she and her counsel had been "awaiting" receipt of the record.

On July 8, 1999, Nortel responded to Petitioner's Motion and moved for dismissal of the appeal. The motion to dismiss was granted on August 4, 1999.

Undaunted, Petitioner filed a Motion for Rehearing on August 16, 1999. In that motion, Petitioner stated that her counsel had changed law firms "around" April 27, 1999. Further, she stated that an attorney at the prior firm who was "handling the logistics for receipt of the record" first called the Fifth Circuit on June 25, 1999 to find out where the record was, and she was informed at that time of her failure to file a Notice of Appearance Form. Motion for Rehearing at 2; Petition at 4. Petitioner never has explained why her prior counsel waited until several days *after* Petitioner's brief was due at the Fifth Circuit before making any inquiry as to the whereabouts of the record.

The Fifth Circuit denied the Motion for Rehearing on September 9, 1999.

SUMMARY OF REASONS FOR DENYING THE WRIT

Petitioner and her prior counsel engaged in a pattern of willful neglect and noncompliance with both the Federal Rules of Appellate Procedure and the Local Rules of the Fifth Circuit. Petitioner ignored two written directives from the Clerk of the Fifth Circuit to file a form of appearance, even though the Clerk clearly informed her that the district court record would not be released to her until she did so. Further, she failed to contact the Fifth Circuit regarding this issue until *after* the deadline to file her brief had passed. The Fifth Circuit's dismissal of the

appeal in the face of such recalcitrance is consistent with the Rules of Appellate Procedure and the Fifth Circuit's authority to enforce its rules and control its docket. The Fifth Circuit's decision is not in conflict with any other United States Court of Appeals on any important matter, nor is this a question of federal law sufficiently important to merit review by this Court.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals is Expressly Authorized to Control its Docket by Implementing and Enforcing Local Rules.

The Federal Rules of Appellate Procedure expressly authorize each court of appeals to "make and amend rules governing its practice." Fed. R. App. P. 47(a)(1); 28 U.S.C. § 2071. Further, the courts of appeals are authorized to enforce those rules, with two limitations. First, "a local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement." Fed. R. App. P. 47(a)(2). Second, "[n]o sanction or other disadvantage may be imposed for any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement." Fed. R. App. P. 47(b). In the instant case, as demonstrated below, neither of these limitations is applicable, and therefore the Fifth Circuit acted within its authority by dismissing Petitioner's appeal.

Further, despite Petitioner's convoluted, contrived effort to create a "dispute" among the courts of appeals that would merit this Court's review, there is no requirement that the various local rules be identically worded or enforced. Indeed, the very fact that this Court, in promulgating the Federal Rules of Appellate Procedure, expressly provided for local rules, and thus contemplated that such rules would not be strictly uniform, demonstrates that the Court does not consider such diversity alone to be sufficiently important to warrant "correction" by the Court. In addition, the Rules themselves *do* address enforcement of local rules through the safeguards provided in Rule 47(a)(2) and 47(b), *i.e.*, by mandating that an appellant's rights may be denied only where there is actual notice of the Rule and willful noncompliance with that Rule. Therefore, Petitioner seeks a writ of certiorari in order to have this Court impose a uniform standard, even though such a standard *already* is provided in the Rules. Therefore, the Petition should be denied.

II. Petitioner Failed to File Her Brief in the Court of Appeals Due to Her Willful Noncompliance with the Federal Rules and the Local Rules of the Fifth Circuit.

The dismissal of Petitioner's appeal cannot be reversed as an improper sanction for a nonwillful violation of a local rule. First, Petitioner's failure to obtain the record on appeal was due to her failure to file a notice of appearance, which violated both Fifth Circuit Local Rules 12 and 46, as well as Fed. R. App. P. 12(b). Since this was

a violation of the Federal Rules themselves, the limitations of Fed. R. App. P. 47(a) regarding enforcement of local rules are inapplicable. Second, the conduct of Petitioner's previous counsel clearly constitutes willful noncompliance with the Rules.

Rule 12(b) of the Fed. R. App. P. provides that an attorney who files a notice of appeal must file "a statement with the circuit clerk naming the parties that the attorney represents on appeal." The Advisory Committee Notes to this rule explain:

> The rule allows a court of appeals to require the filing of the representation statement at some time other than specified in the rules so that if a court of appeals requires a docketing statement or appearance form the representation statement may be combined with it.

Advisory Committee Notes (1993 Amendment). Indeed, this is the approach taken by the Fifth Circuit, which provides in Local Rule 12:

> Counsel can satisfy the "representation statement" required by Fed. R. App. P. 12(b) by completing this court's "Notice of Appearance Form," and returning it to the clerk within 20 days of filing of the notice of appeal.

Fifth Circuit Rule 12. Thus, the Notice of Appearance Form which Petitioner failed to timely execute constitutes the representation statement required by Fed. R. App. P. 12(b). As a result, the dismissal of the appeal does not violate Fed. R. App. P. 47(a)(2), because Petitioner failed

to comply not only with a local rule, but with one of the Federal Rules of Appellate Procedure.[3]

Second, even if the dismissal of the appeal *is* governed by Rule 47(a)(2), the dismissal should not be reversed, because it came as a result of Petitioner's willful failure to comply with the rule. Curiously, Petitioner *still* has not explained why her previous counsel did not timely submit the Notice of Appearance Form, which resulted in their not obtaining the district court record. However, what we do know of her prior counsel's behavior demonstrates a pattern of willful noncompliance with the instructions of the court, including:

1. Failure to timely submit a Transcript Order Form, and delaying in correctly completing the form even after the deadline to submit the form had passed;

2. *Twice* ignoring written instructions from the Clerk of the Fifth Circuit regarding filing a Notice of Appearance Form;[4]

3. Never submitting any notice of lead counsel's change of address; and

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[3] The Advisory Committee Notes to Rule 47(a)(2) clearly state that the Rule only addresses "violations that are not willful and only these involving *local* rules directed to matters of form." (Emphasis added).

[4] It is worth noting that when Petitioner's former counsel *did* submit the Notice of Appearance Form, it bore at the top a stamp from the clerk of the court identifying the case number. In other words, this form apparently was the one sent by the clerk on February 25, 1999, and Petitioner's counsel simply held on to the document for months before finally submitting it after the briefing deadline expired.

4. Failing to even inquire as to the whereabouts of the record until *after* the deadline to file a brief had passed.

Despite repeated instructions from the Fifth Circuit, and despite already having their client's appeal dismissed once due to their dilatory conduct, Petitioner's former counsel still knowingly sat on their hands while the briefing deadline passed. This is not a matter of mere oversight – it is a case of willful noncompliance with the Local Rules of the Fifth Circuit as well as the Federal Rules of Appellate Procedure. As the Advisory Committee Notes explain, Rule 47(a)(2) "does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form." Therefore, Fed. R. App. P. 47(a)(2) is inapplicable, the dismissal was appropriate, and this matter does not warrant review by this Court.

III. Petitioner Had Actual Knowledge of the Rules That She Violated.

As demonstrated *supra*, the dismissal of the appeal by the Fifth Circuit complies with Fed. R. App. P. 47(b), because Petitioner and her counsel had actual notice of the rules they were violating, by virtue of the written instructions from the Clerk of the Court on February 25 and May 10, 1999. Petitioner cannot in good faith maintain that she lacked notice of the rules she was flouting. Therefore, the Petition should be denied.

CONCLUSION

The Fifth Circuit properly acted within its rule-making and rule-enforcing authority in dismissing Petitioner's appeal. Petitioner repeatedly and willfully violated the Federal Rules of Appellate Procedure by failing to submit a Notice of Appearance Form and by failing to timely file her brief. The Fifth Circuit's dismissal of the appeal does not create any conflict among the Courts of Appeals, nor does it raise any issue of law sufficiently serious to merit review by this Court. Inasmuch as Petitioner took virtually no action to keep her appeal alive, it is improper for her to expect this Court to resurrect it. Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT E. SHEEDER*
R.S. GHIO
JENKENS & GILCHRIST
A PROFESSIONAL CORPORATION
1445 Ross Avenue, Suite 3200
Dallas Texas, 75202
(214) 855-4500
Counsel for Respondent
* *Counsel of Record*

APPENDIX 1

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

May 10, 1999

Mr Donald Wayne Hill
White, Hill, Sims & Wiggins
Suite 2300
1999 Bryan Street
Dallas, TX 75201

No. 99-10170 McKinley v. Northern Telecom
USDC No. 3:97-CV-2036-BC

We have docketed the appeal as shown above, and ask you to use the case number in future inquiries. **We will send you a briefing checklist upon request.** The briefing checklist is also on the Internet at the Fifth Circuit's Website "www.ca5.uscourts.gov".

Briefing Notice. The record is complete for purposes of the appeal, see FED. R. APP. P. 12. Appellant's brief and record excerpts are due within 40 days of the date shown above, see FED. R. APP. P. & 5TH CIR. R. 28, 30, and 31. See also 5TH CIR. R. 31.1 to determine if you have to file electronic copies of the brief, and the format you must use.

Policy on Extension. The court grants extensions sparingly and under the criteria of 5TH CIR. R. 31.4. You must contact opposing counsel and tell us if the extension is opposed or not.

Reply Brief. We do not send cases to the court until all briefs are filed, except in criminal appeals. Reply briefs must be filed within the 14 day period of FED. R. APP. P. 31(a)(1). See 5TH CIR. R. 31.1 to determine if you have to file electronic copies of the brief.

Brief Covers. We have attached the caption for this appeal and ask you to use it on any briefs you file with this court.

Dismissal of Appeals. The clerk may dismiss appeals without notice if you do not file a brief on time.

Appearance Form. If you have not filed an appearance from [sic] as required by 5TH CIR. R.46, you must do so within 10 days from this date. You must name each party you represent, see FED. R. APP. P. and 5TH CIR. R. 12.

We will not forward the record until you file an appearance form.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By:/s/ Shari Stewman
Shari D. Stewman,
Deputy Clerk

Enclosure
cc w/encl: Mr. Robert Elwood Sheeder

BR-1

APPENDIX 2

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

February 25, 1999

Mr Donald Wayne Hill and
Ms Delia M Parker
White, Hill, Sims & Wiggins
Suite 2300
1999 Bryan Street
Dallas, TX 75201

No. 99-10170 McKinley v. Northern Telecom
USDC No. 3:97-CV-2036-BC

We have docketed the case and ask you to use the case number above in future inquiries.

You must first complete the transcript order form the district court clerk provided you. When completed, this meets your obligation to order the necessary portion(s) of the court reporter's transcript, see FED. R. APP. P. 10(b). Second, you must make financial arrangements with the court reporter to pay for the transcript. If you are pro se and unable to afford payment, you must file a motion with the district court requesting a transcript at government expense, and notify this court of the filing. We will then coordinate with the court reporter for a time to file the transcript. We will inform you if extensions of this time are allowed. If you do not order or make arrangements to pay for the transcript within the 15 days, we will

dismiss your appeal without further notice, unless the case is a criminal appeal and you are proceeding In Forma Pauperis, see 5TH CIR. R. 42.3.

We will provide information concerning the briefing of this appeal to all parties at a later date. If a transcript is unnecessary, notify us and we will start the briefing schedule.

All counsel who desire to appear in this case must sign and return the attached appearance form, naming each party you represent, within 15 days from this date, see FED. R. APP. P. 12(b) and 5TH CIR. R. 12. If you fail to do so we will remove your name from our docket in this case. We cannot release official records on appeal unless you have entered an appearance. Pro se parties do not need to file an appearance form.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By:/s/ C Tyler/snd
Cindy Tyler, Deputy Clerk

/snd
Enclosure
cc w/encl: Mr Robert Elwood Sheeder and
Ms Carol Ann Darling

DKT-2